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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JERALD A. HAMMANN

Appeal 2011-009786
Application 09/999,378
Technology Center 3600

Before: MURRIEL E. CRAWFORD, BIBHU R. MOHANTY, and
MICHAEL W. KIM, *Administrative Patent Judges.*

KIM, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE

This is an appeal from the final rejection of claims 1-25 and 61-85.^{1, 2}
We have jurisdiction to review the case under 35 U.S.C. §§ 134 and 6.

The invention relates generally to employing capacity/demand management to select types of industries (Spec. 1:6-9).

Claim 1, reproduced below, is further illustrative of the claimed subject matter.

1. A computer-based method for capacity/demand management in restaurant and other prepared-food service industries, comprising:

accepting, via computer, transaction parameter values for composite resources, wherein each composite resource has associated therewith at least a service location, a service date and a service time;

accepting from at least one potential user of composite resources, via computer, at least one composite resource transaction parameter value;

communicating to the at least one potential user of the at least one composite resource at least a portion of the transaction parameter values for at least one composite resource related to the potential user's at least one transaction parameter value;

modifying, in response to the communication, at least one of the demand for the at least one composite resource and the capacity of the at least one composite resource, wherein, when capacity exceeds demand for the at least one composite resource, the modifying includes increasing the demand for and/or decreasing the capacity of the at least one composite resource;

¹ Our decision will make reference to the Appellant's Appeal Brief ("App. Br.," filed December 20, 2010) and Reply Brief ("Reply Br.," filed May 17, 2011), and the Examiner's Answer ("Ans.," mailed March 17, 2011).

² The present appeal is related to U.S. Patent Application No. 09/840,332, also under appeal as Appeal No. 2011-009944.

wherein the at least one composite resource is employed in prepared food service industries;

wherein the at least one service date and service time is a date and time point or range measure indicating a present or future first date and time when the service is available;

wherein the at least one service availability date and time is related to the availability of at least one service provider resource comprising in part the at least one composite resource;

wherein the at least one service provider resource is a human resource;

wherein the at least one service provider resource contributes more than a nominal amount of time to producing and/or making available the at least one composite resource;

wherein the communication occurs prior to any first assignment of other concurrently-consumed and/or concurrently-utilized composite resources to the at least one potential user;

wherein the capacity of the at least one composite resource is a measure of the on-hand supply and/or availability, if applicable, of the at least one composite resource at a first date and time plus a measure of an ability to produce and/or make available additional quantities of the at least one composite resource over a first date and time period beginning at the first date and time and ending at a second date and time; and

wherein the demand for the at least one composite resource is a measure of the on-hand consumption and/or utilization, if applicable, of the at least one composite resource at the first date and time plus a measure of an ability to consume and/or utilize additional quantities of the at least one composite resource over the first date and time period.

Claims 1-25 and 61-85 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Hailpern (U.S. 6,922,672 B1, iss. Jul. 26, 2005) and Dietrich (U.S. 5,630,070, iss. May 13, 1997).

Claims 1, 6, 11, 16, 21, and 61-75 stand provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 31-40 of co-pending Application No. 09/840,332.

We AFFIRM.

FINDINGS OF FACT

Specification

1. The Specification defines “composite resources” as “a collection of resources that a user typically will purchase as a bundle at a single price” and describes restaurant service as an example of a composite resource (15:23 – 16:2).
2. The Specification defines “transaction parameters” as “a set of variables describing composite resources. Transaction parameters include, but are not limited to, transaction price parameters, composite resource availability (date/time) parameters, and various profile . . . parameters.” (18:27 – 19:2).
3. The Specification does not provide a lexicographic definition of “human-factor resources.”
4. The Specification does not provide a lexicographic definition of “static ability.”

ANALYSIS

Obviousness Rejection of Independent Claim 1³

We are not persuaded the Examiner erred in asserting that a combination of Hailpern and Dietrich renders obvious “accepting, via computer, transaction parameter values for composite resources, wherein each composite resource has associated therewith at least a service location, a service date and a service time,” as recited in independent claim 1, because the Examiner does not address the critical distinction between the promotions disclosed in Hailpern and the composite resources, as presently claimed (App. Br. 28-29; Reply Br. 2-3). As an initial matter, we note that Hailpern discloses that its dynamic method for targeting promotions is applicable to products and services (col. 2:37-39). While Appellant attempts to draw a distinction between the services disclosed in Hailpern and the “composite resources” of exemplary independent claim 1 (App. Br. 30-31), we find Appellant’s position to be unsupported by the language of the claims and their Specification. Given that Appellant’s Specification describes restaurant service as a “composite resource” (FF 1) and Hailpern describes available service capacity to service customers (col. 5:30-37), we find that the Appellant has failed to provide persuasive evidence to support a narrower construction of “composite resource,” such that it would not read on the services offered in Hailpern’s promotion system under the Examiner’s broad, but reasonable construction (col. 5:16-17; *see* Ans. 4-5).

³ As Appellant argues independent claims 1, 6, 11, 16, 21, 61, 62, 63, 64, and 65 together, we choose independent claim 1 as representative of the independent claims 1, 6, 11, 16, 21, 61, 62, 63, 64, and 65.
37 C.F.R. § 41.37(c)(1)(vii).

See In re Am. Acad. of Sci. Tech. Ctr., 367 F.3d 1359, 1364 (Fed. Cir. 2004) (“During examination [of a patent application, a pending claim is] given [the] broadest reasonable [construction] consistent with the specification, and . . . claim language should be read in light of the specification as it would be interpreted by one of ordinary skill in the art.”) (internal citation and quotations omitted).

Equally unpersuasive are Appellant’s assertions that the Examiner erred in asserting that the combination of Hailpern and Dietrich fails to disclose or suggest that composite resources are associated with “at least a service location, a service date and a service time,” because Hailpern fails to disclose specifying the service availability time for a transaction (App. Br. 29-30; Reply Br. 3-5). In making this determination, we agree with the Examiner that the promotions in Hailpern which may expire within a predetermined period of time correspond to a service date and a service time (Ans. 18-19 (citing Hailpern at 3:1-2)). While we acknowledge, as the Examiner has done, that Hailpern does not explicitly state a specific service date or service time, given that Hailpern discloses promotions expiring within a predetermined amount of time, one of ordinary skill in the art at the time of the invention would have readily appreciated the predetermined periods of time to be adjustable and as specific and granular as required by the service provider offering the promotion, and as such, would have understood Hailpern’s system to render obvious a service date and time being associated with each promotion for goods and services.

We note that the Examiner additionally relies on Dietrich to provide evidence that the expiration time frame disclosed in Hailpern would include a specific service time and service date (Ans. 9). Specifically, the Examiner

relies on Dietrich to disclose that the designation of a time frame for an inventory forecast includes a specified start date and time and an end date and time is well known in the restaurant supply chain management art (col. 6:26-50 and cols. 35:18 – 36:11). Thus, contrary to Appellant’s argument (App. Br. 35-36; Reply Br. 9), Dietrich also discloses a date and time measure.

Similarly, we are not persuaded of error by the Appellant’s argument that the combination Hailpern and Dietrich fails to disclose or suggest “wherein the at least one service date and time is a date and time point or range measure indicating a present or future first date and time when the service is available” (App. Br. 30; Reply Br. 7). As discussed above, Hailpern discloses that a promotion may expire with a predetermined period of time (col. 3:1-2).

Appellant further asserts that the combination of Hailpern and Dietrich fails to disclose or suggest “accepting from at least one potential user of composite resources, via computer, at least one composite resource transaction parameter value wherein the at least one composite resource communicated is related to the potential user’s at least one transaction parameter value accepted” because independent claim 1 requires “user-determined search criteria” (App. Br. 29-30; Reply Br. 5-6) (emphasis omitted). However, as an initial matter, claim 1 does not recite accepting “user determined search criteria” from a potential user, but rather broadly recites accepting, via a computer, at least one composite resource transaction parameter value, which is not the same as “user determined search criteria.” *See CollegeNet, Inc. v. ApplyYourself, Inc.*, 418 F.3d 1225, 1231 (Fed. Cir. 2005) (while the specification can be examined for proper context of a claim

term, limitations from the specification will not be imported into the claims). Therefore, because claim 1 does not set forth any specific steps or mechanism from which the computer accepts the at least one composite resource transaction parameter value, we agree with the Examiner that Hailpern's profile and characteristic information used to match a target product for promotion addresses the limitation, as presently claimed (Ans. 20 (citing Hailpern at 3:5-26)).

We are not persuaded the Examiner erred in asserting that a combination of Hailpern and Dietrich renders obvious "wherein the capacity of the at least one composite resource is a measure of on-hand supply and/or availability, if applicable, of the at least one composite resource at a first date and time plus a measure of an ability to produce and/or make available additional quantities of the at least one composite resource over a first date and time period beginning at the first date and time and ending at a second date and time," as recited in independent claim 1 (App. Br. 30-31; Reply Br. 7). Independent claim 1 is a method claim. By presenting the aforementioned aspect in the conditional "if" format, under a broadest reasonable interpretation of that claim aspect, if the condition is not met, the balance of the claim aspect also does not need to be met.

To that end, Hailpern's system determines if there are changes in store conditions such as available service capacity or inventory (col. 4:28:30). Hailpern's system accounts for a provider's dynamic service capacity and inventory levels as well as demand when determining whether or not to implement a promotion (col. 5:8-15). That is, if inventory or service capacity is high, Hailpern's system determines that a promotion is desirable (col. 4:30-34). Accordingly, under a broadest reasonable interpretation,

Hailpern's system satisfies this limitation of independent claim 1. This same reasoning applies to Appellant's similar argument regarding a similar limitation: "demand for the at least one composite resource is a measure of on hand consumption and/or utilization," as recited in independent claim 1 (*see* App. Br. 32-33; Reply Br. 8).

We are also not persuaded the Examiner erred in asserting that a combination of Hailpern and Dietrich discloses or suggests "wherein the measure of an ability to produce and/or make available additional quantities of the at least one composite resource over a first date and time period beginning at the first date and time and ending at a second date and time is derived from at least one human factor resource and is not a static ability," as required by various limitations of independent claim 1 (App. Br. 32 (emphasis omitted); *see also* Reply Br. 8-9). As discussed above, Hailpern discloses determining if there are changes in store conditions such as available service capacity or inventory (col. 4:28:30). While we acknowledge that Hailpern does not explicitly refer to its available service capacity as a "human-factor resource," one of ordinary skill in the art understand Hailpern's reference to "the sales activity on a particular product or service that they provide" (col. 2:37-39) to encompass "human-factor resources." This interpretation is commensurate with Appellant's Specification which does not provide a lexicographic definition of "human-factor resources" (FF 3).

Additionally, we are not persuaded that the Examiner erred in asserting that Hailpern's ability to monitor changing store conditions with respect to service capacity or inventory levels addresses the "not a static ability" limitation of claim 1 (Ans. 21-22). Specifically, Appellant argues

that the Examiner improperly construes “not a static ability,” as it modifies a “human factor resource,” to read on all human resources, because the ability to produce or make available additional quantities of the composite resource is dependent upon the human resource (App. Br. 32; Reply Br. 7). However, we find the Appellant’s argument to be misplaced, as the Examiner does not assert that all human resources address this limitation, but rather asserts that Hailpern’s service capacity for a service-oriented business addresses a human factor resource that is not a static ability, as presently claimed. Accordingly, in the absence of a lexicographic definition for “static ability” (FF 4), we agree with the Examiner that Hailpern’s changing service capacity renders obvious the “not a static ability” limitation of claim 1 under a broadest reasonable construction (*see* Ans. 21-22).

Appellant further asserts that the combination of Hailpern and Dietrich fails to disclose or suggest “wherein when the demand exceeds the capacity for the at least one composite resource, the modifying includes decreasing the demand for the at least one composite resource and/or increasing the capacity of the at least one composite resource” (App. Br. 33-34; Reply Br. 8) (emphasis omitted). However, Hailpern discloses that its system is able to select an optimal discount level for its promotions based on capacity or inventory (col. 5:28-37). Thus, we agree with the Examiner that Hailpern discloses increasing and decreasing demand by determining whether or not to offer a targeted promotion (col. 4:28-34; *see also* Ans. 22-23).

We are also not persuaded the Examiner erred in asserting that the combination of Hailpern and Dietrich renders obvious independent claim 1, because Hailpern and Dietrich are not in the same field of endeavor (App.

Br. 34-35; Reply Br. 9). As an initial matter, we note that a proper non-analogous art analysis compares the references to the claimed invention, and not to each other. *In re Bigio*, 381 F.3d 1320, 1325 (Fed. Cir. 2004) (a reference is analogous art to the claimed invention if: (1) the reference is from the same field of endeavor as the claimed invention (even if it addresses a different problem); or (2) the reference is reasonably pertinent to the problem faced by the inventor (even if it is not in the same field of endeavor as the claimed invention)). Moreover, we agree with the Examiner that each of Hailpern and Dietrich is reasonably pertinent to the problem, faced by the inventor, of using demand control and inventory monitoring to maximize profit and reduce on-hand inventory (Ans. 23-24).

Lastly, to the extent that Appellant is arguing that there is no suggestion or motivation to combine Hailpern and Dietrich because they are not in the same field of prior art (App. Br. 36-37; Reply Br. 10-11), we note that “any need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining the elements in the manner claimed.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 420 (2007). And, to the extent Appellant seeks an explicit suggestion or motivation in the reference itself, this is no longer the law in view of the Supreme Court’s holding in *KSR*. *See id.* at 419. We find that the Examiner has provided articulated reasoning with some rational underpinning to support the legal conclusion of obviousness (*see id.* at 418 (citing *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006))). On pages 9 and 23-24 of the Answer, the Examiner provides the required rationale to support the combination. Therefore, in the absence of specific, technical arguments as to why the motivation is insufficient or whether the improvement described

by the Examiner is more than the predictable use of prior art elements according to their established functions, we find this argument unpersuasive.

For these reasons, we sustain the rejection of independent claims 1, 6, 11, 16, 21, 61, 62, 63, 64, and 65 under 35 U.S.C. § 103(a) over Hailpern and Dietrich, as well as their respective dependent claims that were not separately argued.

Obviousness-Type Double Patenting Rejection

We are not persuaded the Examiner erred in asserting that pending claims 1, 6, 11, 16, 21, and 61-75 are provisionally-rejected in view of the pending claims 31-40 of co-pending Application No. 09/840,332 (App. Br. 39). We note that the Appellant does not argue that the Examiner's rejection is in error, but rather states that the Appellant plans to file a Terminal Disclaimer to overcome the instant rejection (App. Br. 39). Accordingly, we summarily sustain this rejection.

DECISION

The decision of the Examiner to reject claims 1-25 and 61-85 under 35 U.S.C. § 103(a) as unpatentable over Hailpern and Dietrich is AFFIRMED.

The decision of the Examiner to reject claims 1, 6, 11, 16, 21, and 61-75 under the judicially created doctrine of obviousness-type double patenting is AFFIRMED.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

Appeal 2011-009786
Application 09/999,378

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